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SUPREME COURT

OF THE UNITED STATES.

October Term, 1906.

Office Supreme Court
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JAMES H. McKEN

ALFRED H. BURT and JOSEPH J. SINDELE,
Plaintiffs in Error
vs
WILLIAM W. SMITH.
No 67.

Brief in Reply for Plaintiffs in Error.

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Brief in Reply for Plaintiff in Error.

There is only time after the receipt of the brief of defendant in error to make a few suggestions; and such suggestions are made as they may possibly aid the Court in using and interpreting the briefs in chief; and also by way of correcting errors of statement.

Under the first head, page 3 of the defendant's brief, it states erroneously that plaintiff's claim of res adjudicata is upon an *order* of the Circuit Court of Appeals. That claim is made upon the final judgment.

The third statement is wholly erroneous, because it leaves out the statement of the fact that the appeal to the Court of Appeals was from an order granting a new trial, and upon a stipulation for judgment absolute.

This point is stated so fully and repeatedly in the principal brief for plaintiffs in error, that only reference is now made to it.

Under the head "facts" defendant's brief proceeds to state the evidence given on the trial, and the affidavits presented upon the injuction, and to compare them wholly overlooking the fundamental rule that a discretionary order granted upon affidavits only cannot be res adjudicata in a common law trial of issues in a subsequent suit.

Upon the first "point" (page 13, Defendant's Brief) it need only be said that the final judgment in the former suit is fully alleged in plaintiffs' complaint in this action as a judgment upon the merits and was put in evidence, and its force and validity as res adjudicata was never brought in question until by the decision of the Court of Appeals.

The decision by the Court of Appeals by its express language ignores that judgment, and denies its force and validity as an adjudication.

The argument under Points II. III, IV and V, may be briefly considered together. They wholly overlook the fact that the Court of Appeals expressly and necessarily made its decision upon the *same record and same facts* (and

no others) which were adjudicated upon in the injunction suit, and that it expressly places its decision upon its finding from that record that there was infringement; and, *therefore*, that defendant had probable cause to believe there was infringement.

The New York authorities cited on the question of probable cause do not have any materiality at this stage of the case. in view of the decision of the Court of Appeals, and the limitation of the power of that court in disposing of the questions presented. The rule as to probable cause, however, in the New York courts has been correctly stated as follows :

> "If the facts are undisputed and admit "of but one inference the question is one "of law; if disputed, or capable of oppos- "ing inferences, the question is for the "jury."

And the question of defendant's good faith in bringing the action is also a question for the jury.

Wass vs. Stevens, 128 N. Y., 123, 127.

Long Island Bottler's Union vs. Seitz, 180 N.Y.. 243, 248.

Heyne vs. Blair, 62 N. Y., 19.

Hazzard vs. Fleury, 120 N. Y., 223.

Maston vs. Deyo, 2 Wend., 424.

It should perhaps be noted that the temporary injunction was not granted until after the action

had been begun; and *can* have no force, therefore, upon the question of probable cause, unless it has force as res adjudicata, which it has not.

It need only be said with reference to the argument under Point VI, that the Court of Appeals held and stated the rule to be that the action of malicious prosecution of a civil action was maintainable where property had been interfered with by injunction (Record, p. 117), and cited cases to that effect. As shown in our principal brief, it is the rule of the New York Courts, of the U. S. Courts, and of general jurisprudence that where there is no bond the action of malicious prosecution is the *only* remedy to recover damages for the malicious prosecution of a suit in which there was an arrest, attachment or injunction.

The remainder of the argument appears to be addressed to the question as to whether there was in fact infringement; and the other question as to whether the temporary injunction was sufficient evidence of want of probable cause.

On page 29 of the brief it is stated that in the case of Crescent City L. S. Co. vs. Butcher's Union, 120 U. S., 141, it was

> "decided that the decree *pendente lite* con-
> "stituted probable cause."

That case was cited by defendant to the Court of Appeals, and to each of the other courts, and the fact was pointed out that that case decided only the question that the judgment in the pre-

vious action between the same parties which was there held to be a bar, was a *final judgment* upon the merits, and not an order or decree or judgment *pendente lite.*

The Court of Appeals decides that question contrary to defendant's contention, and it is believed that that question is not open here to the defendant in error.

All the authorities cited in defendant's brief upon the question of the effect of the temporary injunction were cited to and considered by the Court of Appeals. (Record, pp. 117-118).

Respectfully submitted,

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